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EVIDENCE IN THE LITIGATION PROCESS:

A COURSEBOOK IN LAW

edited by

Stanley A. Schiff

Professor, Faculty of Law
University of Toronto

Draft edition, 1977

PREFACE

This is a coursebook for law students about the presentation and use of information in the modern common law litigation process. For several reasons I have chosen this description, and the title of the book which synopsizes it, rather than the usual label, "Cases and Materials on the Law of Evidence". First of all, I want to point up the special ways in which the demands of the litigation process shape presentation and use of information, rendering misleading invidious comparisons with techniques of fact-finding in the research sciences or humanities, or in commercial relationships. Secondly, I want to emphasize that the pertinent legal doctrine must be understood (and fashioned) with a constant eye to the process which alone gives it meaning. Thirdly, the book canvasses problems of trial and appellate procedure and judicial use of information in law-making which perhaps have been outside the classic bounds of "evidence law". And finally, the format of the book gives considerably more overt direction to lines of analysis than is common in law casebooks.

The bulk of the legal doctrine examined here is judge-made law. It has been hammered out by generations of judges to solve the particular concrete problems presented to them as they have presided at trials or (more commonly in the last three-quarters century) sat in appellate review of their brothers' work. Judicial law-making here continues to this day.

Only a small part of the pertinent legal doctrine is statutory, and in none of the older Dominions of the British Commonwealth nor in England has the doctrine been legislatively rendered into generally-applicable codes. To be sure, there has been statutory amendment but it has been piecemeal and fragmentary. In England (with Canadian jurisdictions usually parrotting some years later), the major statutory changes were made during the era of court reform in the 19th century. Those few changes made since have each focussed on a specific problem. In this country the statutory amendments are now for the most part gathered in the Evidence Acts of the various provinces and in the Canada Evidence Act passed by the federal Parliament. Others are contained in rules of court. References to specific provisions of these are made throughout this book and, for extra convenience, the Evidence Act (Ontario), R.S.O. 1970, c.151, has been reproduced in full on pages 1419-34 as Appendix A, and the Canada Evidence Act, R.S.C. 1970, c.E-10, on pages 1435-48 as Appendix B.

However, broad reform through legislative action is in the air --in Canada, in England, and in the United States.

To start with the United States: Backed by the extraordinary pioneer work of Professor James Bradley Thayer in the late 19th

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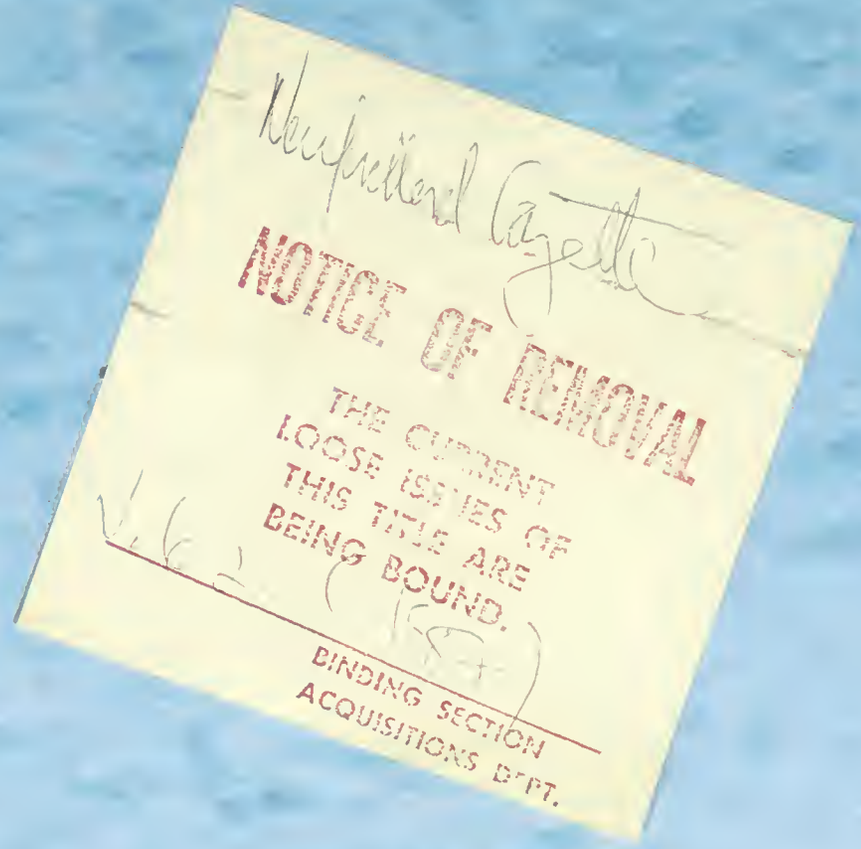
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